UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD DIVISION OF JUDGES

CINCINNATI BELL TELEPHONE COMPANY LLC

and

Case No. 9-CA-088578

COMMUNICATIONS WORKERS OF AMERICA, LOCAL 4400, AFL-CIO/CLC

Daniel A. Goode, Esq.
for the General Counsel.

Anita Cross, Esq. (Cincinnati Bell Telephone Co., Cincinnati, Ohio)
for the Respondent.

DECISION

STATEMENT OF THE CASE

ARTHUR J. AMCHAN, Administrative Law Judge. This case was tried in Cincinnati, Ohio on January 30, 2013. The Union, Local 4400 of the Communications Workers of America filed the charge on September 4, 2012. The General Counsel issued the complaint on December 11, 2012.

The General Counsel alleges that Respondent, Cincinnati Bell Telephone Company, violated Section 8(a)(1) of the Act by conducting an interview with employee Larry Garnes after denying him the right to union representation at the interview. An employee's right to union representation in certain types of communications with his or her employer is often referred to as the employee's *Weingarten* right, after the Supreme decision in *NLRB v. Weingarten*, *Inc.*, 420 US 251 (1975).

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

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FINDINGS OF FACT

I. JURISDICTION

Respondent, a corporation, has its headquarters in Cincinnati, Ohio and provides telephone service in Ohio, Indiana and Kentucky. It annually derives gross revenues in excess of \$100,000 and performs services valued in excess of \$50,000 outside of Ohio. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

In September 2011, Kelly Switzer became Cincinnati Bell's team leader responsible for the oversight of a number employees in Respondent's Network Operations Center including data technician Larry Garnes. Garnes' duties include answering incoming telephone calls from customers experiencing service problems. Shortly after becoming Garnes' team leader, Switzer concluded that Garnes' skills and job performance needed substantial improvement. During the next six to eight months, Switzer counseled Garnes about his performance on approximately 10 occasions

On March 12 and 13, 2012, Garnes and Switzer exchanged emails, Resp. Exh. 1. Switzer, in response to Garnes, wrote:

Larry, I agree the customer is our first priority. I am not saying you can't ask questions but you have been here for 7 years and your knowledge level needs to improve. You need to apply yourself and I would encourage you to take good notes. We will be putting new measurements in place and if this type of behavior continues, you could potentially go on a performance improvement plan (PIP).

There is no evidence that Switzer counseled Garnes between March 13 and April 25, 2012. On April 25, 2012, Switzer listened to recordings of service calls handled by members of her team. While listening to a 4 calls handled by Garnes, she made notes and then called Garnes into her office.

After Garnes came to Switzer's office, Switzer began to tell him about mistakes he made during a call at 12:55 p.m., G.C. Exh. 4. Her first statement was apparently that Garnes failed to tell another party to the call, a Cincinnati Bell employee named Pat, that a customer was on the line. Garnes then told Switzer he wanted a union representative at the meeting. Garnes also told Switzer that his union representative had told him not to talk to her without union representation.

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Switzer told Garnes he did not need union representation. Switzer checked with a more senior manager either before telling this to Garnes the first time or after Garnes repeated his request. Switzer then proceeded to inform Garnes about the errors he made in handling the call. She told him that he didn't let the other employee know that the customer was on the line.

Garnes said he did so. Switzer and Garnes listened to the tape of the call. She then agreed that Garnes was correct ¹

Switzer either told Garnes that he did not know the difference between two types of service tickets or asked him whether he knew the difference, Tr. 16-17, 40. Garnes then explained the difference between the types of tickets.² Switzer then said that from the recording it sounded as if the other employee, first name Pat, was upset with Garnes. Garnes disputed this and suggested that Switzer call Pat. Switzer then indicated that was not necessary and told Garnes to go back to his desk.³

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Switzer testified at hearing that she told Garnes that he would not be disciplined as a result of their meeting, Tr. 51. Garnes testified that Switzer did not tell him that the meeting would not lead to discipline, Tr. 17. I do not credit Switzer's testimony on this point for several reasons: 1) her affidavit given on October 18, 2012 does not mention giving such assurances to Garnes; 2) her contemporaneous notes do not mention such assurances; and 3) her testimony was made in response to a leading question from Respondent's counsel, as opposed to a narrative of what transpired at her meeting with Garnes. Moreover, I conclude that it makes no difference, given the circumstances, whether or not Switzer assured Garner he would not be disciplined as a result of the meeting or not.

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I so conclude because: 1) given the fact that Garnes had been warned by Switzer in March that he might be placed on a PIP, he could reasonably take any such assurance from Switzer with a grain of salt; 2) the April 25 counseling may have been the first counseling Garnes received after being informed that he might be placed on a PIP; 3) Switzer's April 25, 2012 notes were placed in Garnes' personnel file, and 4) On October 3, 2012, Respondent issued Garnes a warning letter, G.C. Exh. 2. That letter stated that Garnes had been counseled one or more times in the prior year for a number of issues, including not placing good notes on a service ticket, one of the issues Switzer discussed with Garnes on April 25, G.C. 4. Switzer testified at hearing that the warning letter was the result of cumulative misconduct or mistakes on the part of Garnes, Tr. 67.

The October 3 warning followed an investigatory meeting attended by Switzer, Garnes, union vice president Steve Cruse and Switzer's supervisor, Dennis Ford on July 12, 2012, Resp. Exh. - 2. The focus of that meeting appears to be Garnes' unavailability to handle service calls on July 11.

Analysis

The term "Weingarten rights" refers to a decision of the United States Supreme Court in *NLRB v. Weingarten, Inc.*, 420 US 251 (1975) in which the Court held that the Board's construction of Section 7 of the Act, with regard to interviews with potentially disciplinary consequences, was permissible. That construction was that Section 7 creates a statutory right to

¹ This belies Respondent's assertion that Switzer had all the facts she needed without talking to Garnes because she listened to the call.

² Switzer did not contradict Garnes' testimony that he responded to her assertion or question about the types of tickets. I therefore credit Garnes on this point.

³ Garnes' testimony regarding the exchange about Pat is also uncontradicted and thus credited.

refuse to submit without union representation to an interview which the employee reasonably fears may result in the employee's discipline. The court noted that the Board's construction in *Weingarten* emanated from several prior cases in which the Board shaped the contours and limits of this statutory right.

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The Court quoted extensively from the Board's opinions in *Quality Manufacturing Co.*, 195 NLRB 197 (1972) and *Mobil Oil Corp.*, 196 NLRB 1052 (1972). Thus the decision makes it clear that the parameters of the *Weingarten* right are those set forth by the Board. First the Board found it was a serious violation of the Act to deny an employee's request for union representation and compel the employee to *appear unassisted at an interview which may put his job security in jeopardy* (emphasis added).

Second, the right arises only where the employee requests union representation. Third, the right is limited to situations where the employee reasonably believes the investigation will result in disciplinary action. The Board noted that the rule did not apply to run-of-the-mill shop-floor conversations such as those in which the employee is given instructions or training or needed corrections of work techniques.

Fourth, the Board stated that the exercise may not interfere with legitimate employer prerogatives. Thus, the employer need not justify refusing to grant the employee union representation, but rather is entitled to conduct an inquiry into the employee's conduct without the employee's participation. The employer is then free to act on the basis of information derived from other sources.

The Court in *Weingarten* quoted the following passage from the Board's decision in *Mobil Oil*:

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The employer may, if it wishes, advise the employee that it will not proceed with the interview unless the employee is willing to enter the interview unaccompanied by his representative. The employee may then refrain from participating in the interview, thereby protecting his right to representation, but at the same time relinquishing any benefit which might be derived from the interview. The employer would then be free to act on the basis of information obtained from other sources.

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Fifth and finally, the Board noted that the employer had no duty to bargain with the union representative. It is free to insist that it is only interested in hearing the employee's own account of the matter under investigation.

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I conclude that Respondent violated Section 8(a)(1) by continuing its April 25 interview with Garnes after denying him union representation. Given the fact that Garnes had previously been advised that he may be placed on a PIP, it was not unreasonable for him to believe that he would be disciplined when Switzer summoned him to her office on April 25. Indeed, the call discussed by Switzer was a contributing factor, albeit a minor one, to his October 3, 2012 discipline.

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In this regard, I believe that an employee is entitled to union representation if the employee reasonably believes that a meeting could eventually lead to discipline, as opposed to solely an expectation of an immediate sanction. Thus, I conclude that the *Weingarten* right attaches to an interview for which the employee reasonably believes that the employer is building a case against the employee for discipline in the future.

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It is unclear that Garnes was familiar with Respondent's Employee Conduct and Corrective Action Policy, G.C. Exh. 3. However that policy clearly views counseling to be part of its disciplinary process. The policy states that employees who fail to meet job performance or conduct expectations shall be

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subject to disciplinary ("corrective") action. The policy also defines "corrective action" to include counseling, warning, suspension and termination.

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I credit Switzer's testimony that it is routine for her to call employees into her office to point out areas in which they could improve in their performance. While not all such counseling sessions may be situations in which the *Weingarten* right is applicable, I find that it is applicable in the circumstances of this case in which Garnes was already advised by Switzer that he was a candidate for a PIP. The fact that Garnes had been counseled previously is irrelevant, since he had recently be advised he might be put on a PIP and there is no evidence as to whether or not this was the first counseling he had received since the March 13 email.

An employer need not allow a union representative in situations in which the employer is merely communicating a disciplinary decision previously determined, *Baton Rouge Water Works*, *Co.*, 246 NLRB 995, 997 (1979); or merely informing the employee of nondisciplinary administrative decision, *Success Village Apartments*, 347 NLRB 1065, 1071 (2006). That principle is not at issue in this case in that Respondent was not informing Garnes that he was being disciplined. However, Respondent contends that the conversation between Switzer and Garnes was not an interview because Switzer was not seeking information from Garnes.

I conclude that the conversation was an "interview" subject to the *Weingarten* principle. There was an exchange between Switzer and I find that she either implicitly or explicitly sought information from Garnes, such as whether he informed Pat that the customer was on the line and whether he knew the difference between different types of service tickets. What Respondent characterizes as statements by Switzer were at a minimum attempts to have Garnes verify that he had 1) not informed Pat that the customer was on the line; and 2) that he did not know the difference between the types of tickets. The Board's decision in *Baton Rouge Water Works* suggests that whenever the employer seeks information from an employee in a situation in which the employee reasonably believes that discipline may result, the employee has a right to *Weingarten* representation.

It is of course true that Switzer need not have called Garnes into her office. She could have, for example, emailed him with her opinions about his handling of the call without implicating Garnes' *Weingarten* rights.⁵ She could have also have called him to her office and told him what she believed he had done incorrectly without asking for any input from Garnes. Switzer also could have issued Garnes a disciplinary warning on April 25, with the attendant risk of soliciting a grievance. However, in conducting an interactive conversation with Garnes after he had invoked his *Weingarten* rights, I find that Respondent, by Switzer, violated Section 8(a)(1), see *Quazite Corp.*, 315 NLRB 1068, 1070 (1994).

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

⁴ In *Success Village Apartments*, relied upon by Respondent, the meeting found by the Board not to implicate *Weingarten* rights was the second meeting of the day between the employee and his manager. At that meeting, the manager did not seek any information from the employee. He simply required the employee to acknowledge company policy in writing.

⁵ However, if an email solicits the employee's response to allegations of misconduct, there may be *Weingarten* implications.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁶

ORDER

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The Respondent, Cincinnati Bell Telephone Company, Cincinnati, Ohio, its officers, agents, successors, and assigns, shall

- 10 1. Cease and desist from
 - (a) Conducting interviews with employees who have requested union representation in circumstances in which the employee or employees could reasonably believe that discipline may result without allowing the employee or employees' union representation.
 - (b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

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- 2. Take the following affirmative action necessary to effectuate the policies of the Act.
- (a) Within 14 days after service by the Region, post at its Cincinnati, Ohio facility copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 25, 2012.
- (b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

⁶ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

⁷ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

	Dated, Washington, D.C., March 13, 2013.	
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		Arthur J. Amchan Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the National Labor Relations Board An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union Choose representatives to bargain with us on your behalf Act together with other employees for your benefit and protection Choose not to engage in any of these protected activities.

WE WILL NOT conduct interviews with employees who have requested union representation in circumstances in which the employee or employees could reasonably believe that discipline may result without allowing the employee or employees to have a union representative at such interview.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

		CINCINNATI BELL TELEPHONE COMPANY, LLC	
		(Employer)	
Dated	By		

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

550 Main Street, Federal Building, Room 3003, Cincinnati, OH 45202-3271 (513) 684-3686, Hours: 8:30 a.m. to 5 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (513) 684-3750.